No. 16,283

IN THE

United States Court of Appeals

For the Ninth Circuit

UNDERWRITERS AT LLOYD'S OF LONDON, VICTORIA INSURANCE COMPANY, LTD., ORION INSURANCE COMPANY, LTD., and EAGLE STAR INSURANCE COMPANY, LTD.,

Appellants,

vs.

CORDOVA AIRLINES, INC.,

Appellee.

Upon Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

STATEMENT OF JURISDICTION.

This action was commenced on June 21, 1956 in the District Court for the Territory of Alaska, which had general civil jurisdiction, both local and Federal, without regard to the presence or absence of diversity of citizenship or a federal question. 48 USC Sec. 101 (31 Stat. 322).

This appeal is taken from a judgment for the plaintiff-appellee entered on June 12, 1958 upon a general jury verdict, pages 71-73 of the Transcript of Record (hereinafter referred to as "R"). The trial judge was the Honorable Harry C. Westover, U. S. District Judge for the Southern District of California, as visiting judge. All parties waived any question of the power or jurisdiction of Judge Westover or the court to try the case (R 155).

Notice of appeal to this Court was duly filed on July 17, 1958 (R 74), the time to appeal having been extended by a timely motion for judgment notwithstanding the verdict and for a new trial (R 67), which was denied on June 20, 1958 (R 66, 73).

Jurisdiction to hear this appeal was conferred upon this Court by 48 USC 1291, 1292 and 1294. The appeal was docketed on December 12, 1958 (R 396), whereas Alaska did not become a State and the statutory amendments relating to the jurisdiction of this Court to hear appeals from the District Court for the Territory of Alaska did not become effective until January 3, 1959 (Alaska Enabling Act, Act of July 7, 1958, 72 Stat. 339).

STATEMENT OF THE CASE.

On October 24, 1955 appellants, through their Seattle agent, Farwest General Agency, (a trade name of former defendant D. K. MacDonald & Co., R 10) agreed to insure one of plaintiff's aircraft known as

Cessna 1569 Charley (R 161-62). The face sheet of the policy, (plaintiff's Exhibit No. 1) is reproduced as page 111 of the printed record. The reverse side of this document, containing the disputed provisions of the policy, is set forth as page 142 of the printed record, by inadvertence. Page 142 is labeled "Exhibit A", but this reference is not to a trial exhibit but, rather, what is now page 142 of the printed record was originally "Exhibit A" annexed to appellants' answer to the plaintiff's complaint (R 15). Pages 111 and 142 of the printed record together constitute Plaintiff's trial exhibit No. 1 (R 47, 110, 167).

Appellants, hereinafter referred to as "underwriters", insured appellee in the sum of $15,200.00 against the loss of Cessna 1569 Charley, and the parties agree that appellee (hereinafter referred to as "the airline") is entitled to the full $15,200.00 if it is entitled to recover anything on the policy of insurance (R 154).

On December 18, 1955 Cessna 1569 Charley was totally destroyed except for a few parts salvaged by underwriters. The aircraft crashed while approaching the airstrip at Big Mountain, located near the South shore of Iliamna Lake, on the Alaska Peninsula. The pilot, Herbert N. Haley, was instantly killed (R 162, 291, 243).

Cessna 1569 Charley was on a ninety-day general charter from Cordova Airlines to Morrison-Knudsen Co., a government contractor engaged in the construction of a radar site on top of Big Mountain (R 126-27, 159-160, 242).

Various parties were substituted or dropped both before and during the trial (R 20, 38, 154, 164) but no question is presented concerning this realignment. The action finally resolved itself into a claim by Cordova Airlines, Inc. against Underwriters at Lloyds and certain participating Canadian underwriters, as set forth in the caption of the case on appeal.

The defenses asserted by the underwriters all arise out of the fact that on the flight on which it crashed Cessna 1569 was overloaded, with a cargo of dynamite.

By reason of certain CAB regulations which are hereinafter considered in detail, the dynamite carried by Cessna 1569 Charley was a prohibited Class A explosive which could not lawfully have been carried without a prior waiver from the CAA. The failure to obtain a CAA waiver rendered the flight unlawful. The flight was made by a regular Cordova Airlines pilot whose knowledge of the unlawful carriage must be attributed to the airline. Thus coverage was voided by the language of General Exclusion 4, which provides that the policy does not cover "the use of the Aircraft for any unlawful purpose if with the knowledge and consent of the Assured" (R 142).

A CAA waiver being required for this flight, and no consent having been asked for or received from the underwriters' agent, Farwest General Agency, coverage was voided by the terms of General Exclusion 1(c), which excludes coverage for "any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers" (R 142).

The overloading issue involves General Condition number 2, which provides:

> "The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C.A.A. Approved Operations Manual, and in accordance with operations authorized as set forth therein." (R 142.)

The Approved Operations Manual for Cessna 1569 Charley sets a maximum gross weight for the aircraft when loaded with cargo, etc. Underwriters offered a witness who testified that he counted the remains of sixteen dynamite cartons in the wreckage (R 266-273) which, at fifty-three pounds per case, plus the pilot, fuel, etc., undoubtedly made the aircraft overloaded. On the other hand, the airline produced a witness who testified he made a careful check and was able to locate the remains of only eight dynamite cartons. If only eight cartons of dynamite were on board then doubt is cast upon the claim of overloading. This of course was a question for the jury, which brought in a verdict for the airline. The difficulty is that the court, over the objections of counsel for both sides, insisted upon giving the jury completely opposite instructions as to whether or not they were obliged to find some causal connection between the breaches of the policy and the crash itself. These conflicting instructions are set forth in the Specification of Errors, infra. Because of the conflicting instructions, it is impossible to know whether the jury found that the aircraft was *not* overloaded, and hence brought in a verdict for the plaintiff, or whether they found that

the aircraft *was* overloaded, but brought in a verdict for the plaintiff anyhow because they took to heart those portions of the court's instructions requiring the jury to find, in addition to the overloading, some causal connection between the overloading and the crash. It is for this reason that appellants contend they are entitled to a new trial on the issue of overloading.

A new trial should not be necessary, however, because appellants are entitled to judgment against the plaintiff on the dynamite issue, as a matter of law. The facts concerning the carriage of dynamite are not disputed, the only question being how much was carried. Although admitting that dynamite was carried, and although the CAB regulations prohibit the carriage of dynamite, plaintiff sought to justify its conduct by falling back upon the provisions of CAB Order Number S-712, dated December 2, 1955 (Defendants' Exhibit A, Appendix A hereto), claiming this order constituted blanket permission for this airline to carry dynamite without a CAA waiver. Any reading of Order S-712 reveals however that that regulation merely authorized the U. S. Air Force, not Cordova Airlines, to transport certain security-classified Class A explosives (not ordinary dynamite) in civil aircraft chartered for the exclusive purpose of transporting such explosives (which was not the case here), with certain other safeguards as to shipping and handling, none of which were observed by Cordova Airlines on the flight in question. In spite of the obvious inapplicability of the regulation to Cor-

dova Airlines, the court submitted that issue to the jury, and declined thereafter to disturb what was a legally indefensible verdict.

SPECIFICATION OF ERRORS.

1. The court erred in instructing the jury that:

   "If you find that the defendants have not proved by the preponderance of the evidence that the actual loss of the airplane was caused by overloading then you must find for the plaintiff on this defense." (R 358.)

Defendants objected to this instruction on the grounds that underwriters are not obliged to demonstrate any causal connection between the overloading, which was a breach of the policy, and the crash (R 367-368, 326).

2. The court erred in instructing the jury that:

   "If you believe that the defendants' Exhibit A did not contain blanket authority for the plaintiff to transport the dynamite then you must next consider paragraph 1(c) of the policy of insurance quoted above and determine whether the defendants have proven by a preponderance of the evidence that the actual loss of the airplane 'arose from' and was 'the result of' the failure of the plaintiff to obtain a written waiver from the Civil Aeronautics Authority. In this connection you are instructed that the defendants have stipulated that the dynamite did not explode when the airplane crashed and you must accept this as a fact.

> "If you find that the loss of the airplane 'arose from' or was 'the result of' plaintiff's failure to obtain a specific written waiver from the Civil Aeronautics Authority and if you further find that plaintiff did not obtain the express written consent, then you must find for the defendants on this issue." (R 362.)

Defendants made the same objection to this instruction, namely, that underwriters had no burden to prove any causal connection between breaches of the policy provisions and the crash (R 367-368, 326).

3. The court erred in giving the jury completely contradictory instructions concerning the necessity of finding a causal connection between breaches of the policy and the crash. The instructions on this point quoted in the preceding specifications of error were intermingled with precisely contrary instructions, that the jury need not find any such causal connection:

> "You are also instructed that the defendants need not prove any relationship of cause and effect between any of the alleged breaches of the certificate of insurance and the crash of the aircraft. That is to say, that the defendants need not prove that the alleged carriage of dynamite, or the alleged overloading of the aircraft in any way caused, or contributed to, or increased the likelihood of, the airplane crash which did in fact occur." (R 357.)

The conflicts between the various instructions given on the point of causal connection between breaches of the policy and the crash were objected to and pointed

out to the court by counsel for both sides (R 367-368, 329-330, 334-338, 379-381).

4. The court erred in instructing the jury that:

> "If you find that there is any ambiguity in this contract or in the insurance policy between the general exclusions and the general conditions—you will remember that counsel talked to you about exclusions and conditions. If you find that there is any ambiguity between the general exclusions and the general conditions, you are instructed that the insurance policy in this case was written by the defendant insurance company and inasmuch as the defendant wrote the policy the language thereof must be interpreted and construed most favorably to the insured and against the insurer. And when the language is susceptible of two constructions it should be construed most favorably in favor of the insured.
>
> "Exceptions and conditions are construed strictly against the insurance company in whose favor they are made; and if there is any doubt whether the words of the contract were used in a large or restricted sense, other things being equal the construction must be adopted which is most beneficial to the insured." (R 356.)

Defendants objected to this instruction because interpreting the policy is a duty of the court and not a question for the jury (R 338-341, 48, 143).

This instruction is in direct conflict with a previous instruction given:

> "All questions of law, including the admissibility of testimony, the facts preliminary to such admissions, the *construction* of statutes *and other*

> *writings,* and other rules of evidence *are to be decided by the Court* * * *." (R 348.) (Emphasis supplied.)

Nowhere in the record is there any indication that the court found any actual ambiguities whatever in the pertinent provisions of the policy. The instruction given constituted an open invitation to the jury to find ambiguities where none exist, and to construe the policy for the court, instead of the other way around.

5. The court erred in refusing to give the jury the following portions of defendants' proposed instruction number 1:

> "Accordingly, if you find that the pilot, acting as an employee of Cordova Airlines, knowingly consented to the transportation of dynamite on the flight in question, and if you further find that no special waiver was secured from the Civil Aeronautics Authority for the flight in question, and that the purpose of the flight was for the transportation of dynamite, then you are instructed that the aircraft was being used for an unlawful purpose with the knowledge and consent of Cordova Airlines, and your verdict must be for the defendants and against the plaintiff." (R 52.)

General Exclusion 4 provides that the policy does not cover "the use of the aircraft for any unlawful purpose if with the knowledge and consent of the assured". (R 142.)

It is undisputed that the purpose of the flight was to transport a quantity of dynamite. The carriage of dynamite without a waiver from the CAA was unlaw-

ful, and the jury should have been so instructed. Defendants objected to the court's failure to give a proper instruction on this point (R 327, 331, 226-227, 109, 341, 373, 389).

6. The court erred in denying defendants' motion for a directed verdict (R 48). It is undisputed that the purpose of the flight in question was to transport a quantity of prohibited Class A explosives, namely, dynamite, without the required waiver from the CAA for such a flight, and without the permission of Farwest General Agency, as agent for underwriters. The carrying of prohibited explosives under these circumstances was unlawful, and constituted a violation of General Exclusion 1(c) and General Exclusion 4 of the policy (R 142).

On the undisputed facts defendants were entitled to judgment as a matter of law and a verdict should have been directed.

7. The court erred in denying defendants' motion for a new trial (R 67). The conflicting and improper jury instructions rendering the jury verdict valueless were pointed out to the court in the motion itself and in the argument had thereon (R 67, 379-381).

8. The court erred in giving the following instruction to the jury:

> "In this connection the plaintiff contends that Civil Aeronautics Board order S-712, which has been introduced in evidence as Defendants' Exhibit A amounts to a blanket authority to deviate from Part 49 of the Civil Air Regulations and that in the order portion of this exhibit com-

mencing on page 3 the plaintiff was given a blanket authority to carry dynamite on the flight in question and therefore was not required to obtain a specific waiver from the Civil Aeronautics Authority.

"In this connection you are instructed that the Civil Aeronautics Act defines 'United States' as: 'United States' means the several states, the District of Columbia, and the several Territories and possessions of the United States, including the Territorial waters and the overlying air space thereof.'

"The plaintiff contends that the Territory of Alaska was included in the order, that plaintiff was engaged in a charter carriage of dynamite belonging to the United States Air Force from a remote location to a United States Air Force airport at Big Mountain and needed no specific written waiver from the Civil Aeronautics Authority for the flight.

"If you believe that Defendants' Exhibit A contained blanket authority for the plaintiff to carry the dynamite without a specific written waiver then you must find for the plaintiff on this defense." (R. 361-362.)

Plaintiff does claim that it was given authority to carry dynamite by the terms of CAB Order Number S-712 (Defendants' Exhibit A, Appendix A hereto). The question of whether or not this regulation actually applied to Cordova Airlines was put to the jury, contrary to defendants' objections that the interpretation of the applicable regulations was a matter for the court (R 109, 328, 373).

9. The court erred in denying defendants' motion for judgment notwithstanding the verdict. It was admitted that the plane was used with the knowledge and consent of the airlines (through its pilot) for the transportation of dynamite, without a waiver from the CAA, and without the permission of underwriters' agent, Farwest Central Agency. It flows from this that the plane was used in flying for which a CAA waiver was required, without underwriters' consent, in violation of General Exclusion 1(c) of the policy, and also that the plane was used for an unlawful purpose with the knowledge and consent of the assured, in violation of General Exclusion 4. Each of these defenses being complete defenses to the plaintiff's complaint, judgment should have been entered for the defendants notwithstanding the verdict, in accordance with defendants' motion (R 67-70, 373-379) which incorporated and repeated defendants' motion for directed verdict (R 48-50).

10. The court erred in giving the following instruction to the jury:

> "The defendants contend, among other defenses, that Paragraph 4 of the General Exclusions of the policy of insurance here involved relieves them from liability for the payment of the loss of the airplane because it was carrying a quantity of dynamite at the time it crashed in violation of the Civil Air Regulations and the purpose of the flight was therefore unlawful. Paragraph 4 of the General Exclusions insofar as applicable to this defense reads as follows:
>
> 'This certificate and/or policy does not cover the use of the aircraft for any unlawful pur-

pose if with the knowledge and consent of the assured.'

"This is asserted as an affirmative defense and the burden therefore is on the defendants to prove the material facts to support the defenses by a preponderance of the evidence.

"In this connection you are instructed the word 'purpose' is defined as 'the object; effect, or result, aimed at, intended, or attained.'

"You are instructed that the meaning of the word 'use' is defined as: 'The purpose served—a purpose, object or end for useful or advantageous nature, implying that the person receives a benefit from the employment of the factor involved.'

"You are also instructed that the policy of insurance here involved in Paragraph 8 reads as follows:

'Purposes for which aircraft will be used: Private business and private pleasure flying and commercial operations including passenger and freight flights for hire or reward but excluding student instruction.'

"If you find that the Defendants have not proven by a preponderance of the evidence that the plaintiff in attempting to transport dynamite from the Iliamna Bay to Big Mountain were using the airplane for an unlawful purpose then you must find for the plaintiff on this defense.

"In this connection you are to consider the reason for and the object of the flight, based upon all of the testimony, in order to determine whether the use of the airplane at the time it crashed was for an unlawful purpose and with the knowledge and consent of the assured, Cordova Airlines, Inc.

"If you find that the defendants have proven by a preponderance of the evidence in attempting to transport dynamite the airplane was being used for an unlawful purpose then you must consider whether or not such use of the airplane was with the knowledge and consent of the plaintiff Cordova Airlines." (R 358-360.)

This instruction was duly objected to (R 327-328), upon the grounds that the construction of the policy was a duty of the court and not a question for the jury, there being no ambiguity in the policy in respect of which any evidence was received, and there being no dispute concerning the issuance or wording of the policy.

ARGUMENT.

I. UNDERWRITERS NEED NOT SHOW THAT THE BREACHES OF THE CONDITIONS AND EXCLUSIONS OF THE POLICY RESULTED IN THE CRASH.

The first two errors specified by appellants concern instructions given to the jury to the effect that underwriters had the burden of proving that the crash was caused by overloading and by the airline's failure to secure permission from the CAA to carry dynamite It is submitted that as a matter of law no such connection need be shown.

Appellants' position is supported by the decision of the Court of Appeals for the Fourth Circuit in 1955 in *Bruce v. Lumbermen's Mutual Casualty Co.*, 222 F 2d 642. In that case the deceased was killed

while a passenger in an airplane engaged in aerobatic flight without a parachute. Parachutes would have been of no avail to save the lives of the occupants, because the pilot continued to execute the spins until the plane was so near the ground that parachutes could not have been used effectively. Aerobatic flight without parachutes violated the applicable CAA regulations. The policy provided that it should not apply:

> "(d) To liability with respect to bodily injury or damage caused by the operation of the aircraft with the knowledge of the named insured; (1) if used for any unlawful purpose, or, during flight or attempt thereat, in violation of any government regulation for civil aviation." (Opinion, page 644.)

Recovery was nevertheless sought because there was no causal connection between the violation of the regulation and the fatal crash. In rejecting this contention, the court held:

> "The clear meaning of the policy is not as the appellant suggests that the risk is excluded if the injury is caused by a violation of the regulations, but that the risk is excluded if the injury is caused by the operation of the plane *while* it is being used in violation of the regulation. It is established by the great preponderance of authority in the decisions of this and other courts that an insurer need not show a causal connection between the breach of an exclusion clause and the accident, if the terms of the policy are clear and unambiguous, since the rights of the insured flow from the contract of insurance and not from a claim arising out of tort." (Opinion, page 645.)

The same result was reached by the Court of Appeals for the Eighth Circuit in 1956 in *Globe Indemnity Company v. Hansen,* 231 F 2d 895. This case also involved a claim for the death of a passenger in a plane flying in violation of CAA regulations and applicable state law by intentional aerobatics without parachutes below the prescribed minimum altitude (Opinion, page 905). The policy provided that it did not apply to any insured:

> "(b) who violates or permits the violation of any governmental regulations for civil aviation applying to aerobatics, instrument flying, minimum safe altitudes, repairs or alterations;
>
> "(c) who permits, performs or attempts to perform aerobatics during which the aircraft is intentionally operated at an altitude of less than 1,000 feet above the terrain * * *."

The court found that the exclusions in the policy were not against public policy, and that it was not necessary that the acts excluded by the policy cause the accident, citing with approval *Bruce v. Lumbermen's Mutual Casualty Company,* 222 F 2d 642, supra (Opinion, page 897).

In the case of *DesMarais v. Thomas* (N Y Sp Ct, 1955) 147 N Y S 2d 223, an Alaska claim successfully defended against by underwriters under a similar policy of hull insurance, the court held:

> "Defendant need not show any causal connection between the accident and non-compliance with the condition stated in the exclusion clause." (Opinion, page 226.)

The latest federal case directly in point, decided by the Court of Appeals for the Fifth Circuit on June 30, 1958 (only a few days after the verdict in the instant case) is *Lineas Aereas Colombianas Expresas v. Travelers Fire Insurance Co.*, 257 F 2d 150. This plane crashed during take-off at Leon, Mexico while operated by two Mexican pilots. The policy provided that it should apply only while the plane was being flown by pilots holding U. S. CAB certificates or comparable licenses issued by Colombian air authorities, and neither pilot met these qualifications. Liability was also denied because the plane was being operated with the knowledge and consent of the assured unlawfully and in violation of U. S. civil air regulations. In upholding the terms of the policy the court stated: "What the factors are which insurers consider to be of underwriting importance is not for us to assay" (Opinion, page 154). The court went on to say:

> "* * * it will not do for the Assured to say that with respect to this loss these admitted violations or actions were of no consequence. To do so would first amount to allowing Judge or Jury, unaffected by the painful prospect of paying a claim, to determine what factors are or are not of relative importance in evaluating a risk either for the scope of protection afforded, the nature of protective limitations required, or the cost in terms of premiums."

Not only do the preceding cases represent the weight of authority, but appellants are aware of no decisions whatever holding that in suits under a policy

of hull insurance for accidental loss of aircraft underwriters are required to show that the acts violating exclusions in the policy actually caused or contributed to the crash.

II. DYNAMITE WAS CARRIED IN VIOLATION OF EXCLUSIONS IN THE POLICY.

The fifth, sixth, ninth and tenth errors specified by appellants involve the carriage of dynamite in violation of existing civil air regulations, contrary to two exclusions in the policy.

The first exclusion is number 1 (c), which reads:

> "This Certificate and/or Policy does not cover: * * *
>
> "(c) * * * any flying in which a waiver issued by the Civil Aeronautics Authority is required unless with the express written consent of Farwest General Agency for Insurers." (R 142.)

The airline corporation was examined before trial by the oral deposition of Mr. Merle K. Smith, its president. Mr. Smith admitted that the airlines did not apply for a special permit to carry explosives on the flight in question (R 99). This admission was repeated by Mr. Smith in his testimony at the trial (R 316). Mr. Smith also admitted that he knew the coverage was arranged through Farwest General Agency in Seattle (R 162), and that the airline did not secure permission from Farwest General Agency to make the flight with dynamite (R 231). The final question under this exclusion, then, is whether a CAA waiver

was required for this flight. If such a waiver was required, then clearly General Exclusion 1(c) was violated.

The applicable regulations governing the carriage of explosives in civil aircraft were those promulgated by the Civil Aeronautics Board, and are found in 14 CFR, Part 49, beginning at page 276.

> Section 49.0 provides: "*Applicability of part.* Explosives or other dangerous articles * * * shall not be loaded in or transported by civil aircraft in the United States, or transported anywhere in air commerce in civil aircraft of United States registry except as provided in this part."
>
> Section 49.81 provides: "*Prohibited articles.* No explosive or dangerous article listed in the ICC Regulations (49 CFR Part 72) as an Explosive A, * * * shall be carried on aircraft subject to the provisions of this part."

The said ICC Regulation classifying explosives (49 CFR Sec. 72.5) classifies "dynamite" as a "high explosive", and all high explosives are designated as "explosives A" by the same section. Thus it appears (nor was it controverted at the trial) that dynamite is an explosive A the carriage of which is forbidden on aircraft subject to the regulations, unless special authority was first secured from the Administrator of the CAA. The authorization for such a deviation was contained in 14 CFR Section 49.71, which provided:

> "*Special authority.* In emergency situations or where other forms of transportation are impracticable:

(a) Deviations from any of the provisions of this part for a particular flight may be authorized by the Administrator where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of persons and cargo."

Thus it is established without resort to any disputed issue of fact that a CAA waiver was required for the carriage of dynamite, that no waiver was applied for, and that permission for the flight in question was neither sought from nor given by Farwest General Agency—a plain violation of Exclusion 1(c) of the policy. That the cargo carried was dynamite was freely admitted by the airline (R 36-37, 87, 126, 231, 232).

A question may conceivably arise as to the reasonableness of the provision in the policy that prior written approval be obtained from underwriters agent, Farwest General Agency, for any flight for which a CAA waiver was required. A similar question was raised in *DesMarais v. Thomas,* 147 N.Y.S. 2d 223, supra, where the policy provided that it did not cover any loss arising from piloting other than by pilots described in a schedule annexed to the policy "as approved by D. K. MacDonald and Company", through whom, as in the case at bar, the airplane was insured for Underwriters at Lloyd's, London. The pilots in charge of the plane in the *DesMarais* case had not been approved by D. K. MacDonald and Company, and the court, in denying coverage, held:

"There can be no question, it seems to me, that no triable issue whatsoever is created concerning

the co-pilot's admitted non-possession of the necessary credentials, whatever the good faith of plaintiff in hiring him. Exclusion from coverage on that specific ground at least must be held to follow. But, even as regards the first pilot, there has been no showing that the requirement for MacDonald's approval was unreasonable or against public policy and should not be enforced in accordance with the clear agreement of the parties. We are not faced here with the problem of determining whether, had this pilot's name and papers been submitted to MacDonald and approval unreasonably refused, coverage nevertheless should be adjudged for an accident loss involved in a flight piloted by him in the necessary prosecution of plaintiff's business. My conclusion is that plaintiff has by his own neglect prevented a recovery under this policy."

Underwriters' contentions respecting the airline's undisputed violation of General Exclusion 1(c), were made plain to the court below in defendants' Fourth Affirmative Defense (R 45), at the pre-trial conference (R 113, 117, 119-128), in defendants' timely motion for a directed verdict (R 48-50), in defendants' motion for judgment notwithstanding the verdict (R 67-70) and in the argument on that motion (R 373-379).

Although conceding that questions of law are for the court and not the jury, the court in formulating its instructions to the jury, consistently declined the task of analyzing the various CAB regulations and orders. Instead, the entire issue of the applicability of CAB Order S-712 (Appendix A hereto) was left to

the jury (R 361-362). Similarly, the court declined to instruct the jury, as requested by defendants, that if dynamite was knowingly carried without a CAA waiver, then the aircraft was being used for an unlawful purpose (R 52). Instead of receiving proper instructions thereon, the jury was given the regulations to puzzle out for itself in the privacy of the jury room, as exhibits in the case (Plaintiff's Exhibit 2 and Defendants' Exhibit A) (R 369-370, 391).

We reject as undue modesty the learned trial judge's statement: "I have read Government regulations from time immemorial and I can't understand them" (R 312). Instead, we insist on the verity of the court's statement: "Well, if that is typical of a Government regulation somebody has to explain it * * *" (R 312). That "somebody" is, in the final analysis, we submit, none other than the trial judge himself, reluctant though he may be to undertake the thankless task.

III. CIVIL AERONAUTICS BOARD ORDER S-712 NOT APPLICABLE TO CORDOVA AIRLINES.

The eighth error specified by appellants concerns the instruction by which the court left to the jury the issue of whether or not Cordova Airlines was given blanket authority to carry dynamite on the flight in question by reason of CAB Order S-712 (Appendix A hereto). This regulation was tossed into the lap of the jury (R 361-362), so to speak, in spite of the fact the court first instructed the jury that:

> "All questions of law, including the admissibility of testimony, the facts preliminary to such admissions, the construction of statutes and other writings, and other rules of evidence are to be decided by the court and all discussions of law addressed to the court; * * *." (R 348.)

There is no evidence linking Cordova Airlines with Order S-712. As a matter of fact, several months *after* this crash, on June 1, 1957, the contractor to whom the airlines had furnished Cessna 1569 Charley on a ninety-day general charter, finally persuaded the CAB to issue its regulation number SR-417 (21 F. R. 3776) specifically authorizing designated operators of aircraft, including Cordova Airlines, to handle class A explosives by air, under the conditions set forth in said regulation. Cordova Airlines did not claim retroactive benefit from regulation SR-417. Instead it claimed to have received blanket authority to carry class A explosives under Order S-712.

It is submitted that this particular flight by Cordova Airlines cannot conceivably be held to have been contemplated or authorized by Order S-712, for the following reasons:

A. The Department of the Air Force had nothing to do with this flight, except that Morrison-Knudsen Co., Inc. was in fact engaged on an Air Force contract (R 160) and the dynamite was government property (R 155).

B. The little strip the contractor built on top of Big Mountain on the south shore of Iliamna Lake was not a "military airport terminal" (R 242-243).

C. Cessna 1569 Charley was not obtained for the exclusive purpose of transporting shipments of class A explosives (R 159-160, 242).

D. These explosives did not originate at Tucson, Arizona, nor were they shipped to an Air Defense Command Base (R 243-246).

E. There is no evidence that the Air Force certified that this shipment of "security classified class A explosives" was in accordance with corresponding provisions of the ICC regulations for shipment of explosives by rail.

IV. THE AIRCRAFT WAS BEING USED FOR AN UNLAWFUL PURPOSE.

The fifth error specified by appellants is the court's refusal to instruct the jury to return a verdict for the defendants if they found that the pilot, acting as an employee of Cordova Airlines, knowingly consented to the transportation of dynamite on the flight in question, without a special waiver from the CAA, for the reason that, on these facts, the aircraft was being used for an unlawful purpose with the knowledge and consent of Cordova Airlines (R 52, 330-331).

As demonstrated in points II. and III., supra, the dynamite was carried in violation of CAB regulations. General Exclusion 4 provides that the policy does not cover "the use of the aircraft for any unlawful purpose if with the knowledge and consent of the assured" (R 142).

Cessna 1569 Charley was on a ninety-day charter from Cordova Airlines to Morrison-Knudsen Co., Inc. The pilot was employed and paid by Cordova Airlines (R 79-80). See also the statement of counsel for the airline (R 126-127). The Morrison-Knudsen Co. did, of course, request the pilot to transport dynamite, but the final decision to fly the plane in violation of regulations was made by the Cordova Airlines pilot (R 243-247) who had been similarly engaged in flying dynamite on the previous day, although the president of the airlines denied he had knowledge of this activity until sometime after the crash (R 89). Cordova Airlines, Inc., an Alaska corporation, is a certificated airline (R 159). Surely the corporation is bound by the knowledge and voluntary act of the pilot it chose and paid to be in charge of its aircraft. Certainly the trial judge thought so (R 377). The dynamite being carried with the knowledge and consent of the airline, the question remains as to whether the aircraft was being used for an unlawful purpose. That the carriage of dynamite violated CAB regulations has been demonstrated under points II. and III., supra.

Section 622(h) of Title 49 USC provides:

> "* * * any person * * * who causes the transportation in air commerce of, any shipment, baggage or property, the transportation of which would be prohibited by any rule, regulation, or requirement prescribed by the Civil Aeronautics Board * * * relating to the transportation, packing, marking, or description of explosives * * * shall, upon conviction thereof for each such offense, be subject to a fine of not more than

$1,000.00 or to imprisonment not exceeding one year * * *".

The construction of the phrase "unlawful purpose" in the policy was a matter for the court and not the jury (Wigmore on Evidence, 3rd Ed., Sec. 2555). The carriage of dynamite without a CAA waiver was admitted. There was nothing to submit to the jury, and a verdict should have been directed on this defense, as requested by defendants' motion therefor (R 48). The error was compounded when the court, by its instructions (specification of error number ten, R 359-360), asked the jury to decide what the phrase "unlawful purpose" meant when used in the policy (R 359). This instruction was the subject of a proper objection (R 327), and defendants called this instruction to the attention of the court again in connection with the motion for a new trial (R 68).

V. THE CONFLICTING INSTRUCTIONS ON THE NECESSITY FOR A CAUSAL CONNECTION BETWEEN BREACHES OF THE POLICY AND THE CRASH REQUIRE A NEW TRIAL ON THE ISSUE OF OVERLOADING.

By the instruction quoted in specification of error number 3 (R 357) the court correctly advised the jury that defendants *need not* prove that the carriage of dynamite or the overloading of the aircraft caused, or contributed to, or increased the likelihood of the crash. In the instructions quoted in specifications 1 and 2 (R 358, 362) the court informed the jury it *must find* such a causal connection in order to uphold

underwriters' affirmative defenses. Of course one will never know which of these hopelessly conflicting instructions were taken to heart by the jury, but the result of the conflict is to render the jury's verdict valueless insofar as the issue of overloading is concerned, because it is impossible to know whether the jury found the plane was *not* overloaded, or whether it found the plane *was* overloaded, but that underwriters had not proved a causal connection between the overloading and the crash. Either way, the verdict would have been for plaintiff.

There was substantial evidence from which the jury could have found the plane was overloaded, in violation of General Condition number 2 of the policy, which provides:

> "The aircraft shall be operated at all times in accordance with its Operations Limitations and/or C. A. A. Approved Operations Manual, and in accordance with operations authorized as set forth therein." (R 142.)

The overloading issue is quite complicated, and rests in large part upon the testimony of Mr. Albert N. Lindemuth. Mr. Lindemuth was qualified and accepted as an expert (R 204-206). The CAA approved operations manual for Cessna 1569 Charley (Defendants' Exhibit J) was shown to Mr. Lindemuth (R 206), who was also handed defendants' Exhibit I, a CAA Form 337 showing that Federal wheel-skis, Model AWB 2500 A, had been installed on the aircraft shortly before the crash (R 206-207). The witness was then able to testify that the maximum allow-

able gross weight of the plane as equipped with these ski-wheels was 2,550 pounds (R 207). The empty weight of the aircraft after the wheel-skis were installed was 1,649 pounds (R 210). The witness stated an additional 13 pounds should be added to the empty weight by reason of the galvanized iron placed on the bottom of the skis, making an empty weight of 1,675 pounds (R 210-211). By subtracting the empty weight of 1,675 pounds from the maximum allowable gross weight of 2,550 pounds, the witness arrived at a maximum allowable useful load of 875 pounds for the aircraft (R 211). The witness testified that the "empty weight" of the aircraft does not include usable gasoline, oil, the weight of the pilot, or cargo (R 212). The plane normally carried 10 quarts of oil, weighing 19 pounds, and the standard figure for the weight of the pilot is 170 pounds. The plane had a capacity of 60 gallons of gasoline (5 unuseable gallons being included in the empty weight) (R 212). The witness was then handed defendants' Exhibit K, the pilot's log for the day preceding the crash, which indicates the plane was gassed up by the addition of 35 gallons at the close of operations on December 17 (R 213-214). Defendants' Exhibit K also indicated that the plane made two trips on December 17 covering the same ground as the fatal trip of December 18, and that 35 gallons of gas were consumed by the two trips (R 214). By assuming that the fatal trip took the same time as similar trips the preceding day, and that the same gasoline consumption of 12 gallons per hour was maintained, the witness was able to estimate the gasoline on board at the time of the crash as being

37 gallons (R 214). The parties had stipulated that the gasoline weighed 6 pounds per gallon (R. 154), which gave a figure of 222 pounds for gasoline on board at the time of the crash (R 214). The witness was then asked to assume that 16 cases of dynamite were also on board, weighing 53 pounds each, or a total of 848 pounds (R 215). The 53 pound weight of each case of dynamite was duly established (R 155, 259). The witness then gave a total figure for oil, the pilot, gasoline on board, and the dynamite, of 1,259 pounds, as contrasted with the useful load limit of 875 pounds, making the aircraft 384 pounds overloaded (R 215). The fact that 16 boxes of dynamite were on board at the time of the crash is based upon the testimony of Edwin E. Evans, the site superintendent for Morrison-Knudsen Co., that he examined the scene of the crash and found the remains of 16 dynamite boxes (R 253, 266-273). That the plane would hold 16 cases of dynamite was also established by the testimony of Mr. Evans, who helped the pilot unload 16 boxes of dynamite from the same plane on a trip made the previous day (R 246).

Plaintiff, on the other hand, produced a somewhat interested witness, Mr. Graham Mauer, Chief Pilot for Cordova Airlines, who testified that he examined the scene of the crash and was able to find the remains of only 8 dynamite cartons (R 293-294, 303). Thus a nice question of credibility of witnesses was presented for the jury. Did they believe Mr. Evans' count of 16 boxes, or Mr. Mauer's count of 8? No one will ever know, because one cannot say that the

jury was not also looking for a causal connection between the overloading and the crash, in accordance with the court's erroneous instruction (R 358).

Thus, it is submitted, appellants are entitled to a new trial on the defense of overloading, although a new trial will of course be unnecessary if appellants prevail on either of the two defenses arising from the undisputed fact the plane was carrying dynamite without a special CAA waiver and without the consent of underwriters.

VI. IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY TO CONSTRUE "AMBIGUITIES IN THE POLICY" AGAINST THE UNDERWRITERS.

Specification of Error number 4 concerns the open invitation given the jury to construe the policy against the underwriters, without pointing out any ambiguities to be construed, and in spite of the fact that construction of the written policy was a matter for the court (R 356) (Wigmore on Evidence, 3rd Ed., Sec. 2555). This instruction was formulated by the trial judge himself, who thought counsel for both sides had overlooked something (R 339). Even if it were true, as he said, that the learned judge is mystified by insurance policies in general, still these delicate questions of the legal interpretation of the words of the policy cannot properly be entrusted to twelve laymen who are, after all, the triers only of disputed questions of fact.

Accordingly one cannot remain uncritical of the position taken by the court, that:

3. The new United States District Court for the District of Alaska having succeeded to the Federal jurisdiction formerly exercised by the Territorial Court, by virtue of Sections 13 through 18 of the Alaska Enabling Act (72 Stat. 339), and this being an action brought by an Alaska corporation against various British and Canadian underwriters, where the amount in controversy exceeds $10,000.00, the cause should be remanded, as necessary, to the new United States District Court, to which all pending federal cases will undoubtedly have been transferred by the time this appeal is determined.

Dated, Anchorage, Alaska,
January 4, 1960.

Respectfully submitted,

EDGAR PAUL BOYKO,
ARTHUR D. TALBOT,
By ARTHUR D. TALBOT,
Attorneys for Appellants.

(Appendices A and B Follow.)

Appendices A and B.

Appendix A

ORDER NO. S-712

United States of America, Civil Aeronautics Board
Washington, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 2nd day of December, 1955

In the matter of the petition of Department of the Air Force for authority to deviate from certain provisions of Part 49 of the Civil Air Regulations.

ORDER GRANTING REQUEST FOR AUTHORITY TO DEVIATE FROM CERTAIN PROVISIONS OF PART 49 OF THE CIVIL AIR REGULATIONS

1. By letter dated November 2, 1955, the Chief, Traffic Division, D/Transportation, Office, Deputy Chief of Staff, Materiel, Department of the Air Force (Air Force), requested the Board to authorize the transportation of certain Class A explosives in civil aircraft to certain civilian and military airport terminals.

2. The Board has been advised by the Air Force that: Shipments of such explosives will be restricted

solely to charter or contract aircraft, obtained for the exclusive purpose of transporting shipments classified as Class A explosives in Part 72 of the Interstate Commerce Commission Regulations; loading at origin and unloading at destination will be accomplished by trained personnel thoroughly familiar with necessary safeguards required in the handling of these shipments; containers specifically designed for, and which afford extreme protection against shipping hazards will be used; shipments will be entrusted to the crew of the aircraft, who will be thoroughly briefed on the characteristics and proper handling of the cargo, and will move under a hand-to-hand signature service furnished by the carrier. In addition, the Board has been advised that shipments will follow a regular route pattern, originating at Tucson, Arizona, and shipped to Air Defense Command Bases throughout the United States, some of which are located at municipal airports. Further, a grant of authority to make immediate and expeditious shipment of the Class A explosives in civil aircraft is considered by the Air Force to be needed in the interest of National Defense.

3. Under the provisions of Sections 49.41 and 49.81 of Part 49 of the Civil Air Regulations, no explosive or dangerous article listed in Part 72 of the ICC Regulations as a Class A explosive . . . shall be carried on aircraft. Section 49.71 of Part 49, however, authorizes the Administrator, in emergency situations or where other forms of transportation are impracticable, to permit deviations from any of the

provisions of this part for a particular flight, where he finds that the conditions under which the articles are to be carried are such as to permit the safe carriage of persons and cargo. Since the authority requested by the Air Force in this matter is not for a particular flight, but for a series of flights, the Administrator is not authorized to grant the special authority requested; however, it is apparent that the reasons existing to grant special authority in critical situations for a particular flight would be as compelling where a series of flights was intended, so long as the same critical situation existed in each of the flights intended. Therefore, it would be consistent with the special authority provisions of Section 49.71 to authorize the Air Force to deviate from the provisions of Part 49, as requested.

4. To support the Board's grounds for granting special authority to carry explosives in emergency situations or where other forms of transportation are impracticable, reference is made to Section 49.41 of Part 49 which permits transportation in cargo aircraft of any article packed, marked, and labeled in accordance with ICC Regulations for transportation by rail express. Under Section 71.13 of the ICC Regulations, shipment of explosives may be made upon request of the Departments of the Army, Navy, and Air Force of the United States Government after compliance with certain handling and packing regulations.

5. The Board notes that the Interstate Commerce Commission, pursuant to Section 71.13 of its regula-

tions, has authorized the various United States military departments to transport Class A explosives, by rail, whenever critical situations dictated such authorization. In these situations, however, the ICC has required that certain stringent packing, stowing, and carriage provisions of their regulations be complied with as a condition of such authorization. In addition, it is noted that a number of air carriers were authorized to carry, in recent years during national emergency status, Class A explosives in civil aircraft where it was found necessary in the National Defense.

6. The Air Force has indicated that the shipments intended will be shipped to Air Defense Command Bases throughout the United States, some of which are located at civil airports. In order to give due consideration to the proprietary interests of local airport management where a civil airport is a terminal point, an agreement between the Air Force and the local management should be made, and procedures established, acceptable to the Administrator, for the shipment of Class A explosives to such airport. Since all reasonable safety precautions will be observed in transporting such cargo, and because the movement is in the interest of National Defense, it is expected that civil airport management will enter into such agreement.

7. In the interest of safety, the Air Force will be required to certify that each shipment, by air, of the certain security-classified Class A explosives is in accordance with corresponding provisions of the Interstate Commerce Commission for shipment of ex-

plosives by rail, with respect to packing, marking, stowing, and securing of cargo.

In consideration of the foregoing, the Board finds that an authorization, as more specifically set forth hereinafter, permitting the Air Force to deviate from certain provisions of Part 49 of the Civil Air Regulations would not adversely affect safety and is in the interest of the public and is vital to the National Defense. Therefore,

It Is Ordered:

That contrary provisions of Part 49 of the Civil Air Regulations notwithstanding and subject to the conditions hereinafter set forth, the request of the Department of the Air Force be and it is hereby granted to the extent necessary to transport certain security-classified Class A explosives in civil aircraft to certain military and civil airports in the United States, provided that:

a. Shipments of such explosives by civil aircraft be restricted to charter or contract aircraft obtained for the exclusive purpose of transporting such explosives;

b. Each shipment be loaded and unloaded, packed, marked, stowed, and secured aboard the aircraft in accordance with corresponding rules or special instructions of the ICC for the rail express shipment of Class A explosives, and the Department of the Air Force so certifies;

c. Shipments be entrusted to the crew of the aircraft, who shall be thoroughly briefed on the char-

acteristics and proper handling of the cargo and they move under a hand-to-hand signature service furnished by the carrier;

d. Shipments may be made to any military airport in the United States;

e. Civil aircraft to be used in this operation shall meet the aircraft performance and weight limitations applicable to passenger-carrying aircraft.

f. Shipments may be made at any joint military-civil or civil airport in the United States if a prior agreement for its use has been reached between the Department of the Air Force and local civil airport management, and if procedures and operating instructions, approved by the Administrator, including, but not limited to, notification to the control tower prior to take-off or landing of the general nature of the cargo aboard, and airport weather minimums have been established between the parties.

This order and the authorization granted herein shall expire June 1, 1956, unless sooner superseded or rescinded by the Board.

(Sec. 205 (a), 52 Stat. 984, 49 U.S.C. 425 (a). Interpret or apply sec. 601, 52 Stat. 1007, as amended, 49 U.S.C. 551; sec. 902 (h) 52 Stat. 1015, as amended, 49 U.S.C. 622.)

By the Civil Aeronautics Board:

/s/ M. C. Mulligan

M. C. Mulligan

(Seal) Secretary.

Appendix B

TABLE OF EXHIBITS

Exhibit	Identified	Offered	Received or Rejected
P-1 Insurance policy A-12732-178	47, 110	110	received 110
P-2 Civil Air Reg. 49.3(b)	312-313	314	received 314
D-A CAB regulations S-712 and SR-417	138, 139	139	received 140
D-B Letter to CAB	166	166	received 168
D-C Poppas letter to M-K contracting and claims section	169-171	166	rejected 189 withdrawn 225
D-D 9 photos	168, 173	168 250	rejected 189 received 251
D-E map of Big Mt. area	168, 174	168	received 174
D-F CAB computation sheet	168	168	rejected 189
D-G OS&D Report	192-194	195	received 196
D-H 4 flight reports	196-198	198	rejected 199 received 307 for limited purpose
D-I Maintenance form 337	200-202	202	received 202
D-J Manual for Cessna 1569-C	206	206	received 206
D-K Pilot's log, December 17	213	213	received 213

Exhibit	Identified	Offered	Received or Rejected
D-L Pilot's flight report, December 17	228	228	rejected 229
D-M Pilot's flight report December 18	229	230	received 263
D-N 2 photos of crash scene	248	249	received 249
D-O Dynamite box	257	260	received 260